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## FISCAL IMPACT REPORT

**SPONSOR**      Sen. Cisneros/  
Rep. Salazar      **ORIGINAL DATE** 1/17/19  
**LAST UPDATED** 1/21/29      **HB** \_\_\_\_\_

**SHORT TITLE**      Water Rights Notifications Online      **SB** 12

**ANALYST** Hanika-Ortiz

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

|              | FY19 | FY20            | FY21               | 3 Year<br>Total Cost | Recurring or<br>Nonrecurring | Fund<br>Affected |
|--------------|------|-----------------|--------------------|----------------------|------------------------------|------------------|
| <b>Total</b> |      | \$7.5 to \$10.0 | \$7.5 to<br>\$10.5 |                      | Recurring                    | Various          |

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the State Engineer (OSE)

New Mexico Acequia Association

### SUMMARY

#### Synopsis of Bill

Senate Bill 12 amends the public notice provisions for water rights permit applications in existing Sections 72-5-4 (appropriation of surface water), 72-5A-5 (groundwater storage and recovery), 72-6-6 (water use leasing), 72-12-3 (appropriation of groundwater), and 72-12B-1 (export of water outside the State) to require OSE, concurrent with the dates of publication of the notice required under each statute, to post the following on the website of OSE: (1) the notice of the pending permit application; (2) a copy of the application and supporting documentation; and (3) the last date for other water right owners to file objections or protests to the application.

Sections 1 and 2 of Senate Bill 12 (p. 2, lines 16-18 and p. 4, lines 13-15) further amends water rights notification provisions in Sections 72-5-4 and 72-5A-5 to require applicants to provide an electronic copy of the notice required under each statute to OSE one week prior to publication. Sections 3, 4 and 5 of the bill do not appear to include this same requirement for the applicant.

### FISCAL IMPLICATIONS

OSE reports Senate Bill 12 would require staff to scan and post not just the Notice of Publication but also the application and any supporting documentation, which can be hundreds of pages. The table estimates additional staff time and resources at \$7.5 thousand to \$10 thousand per year.

## SIGNIFICANT ISSUES

OSE reports the agency currently posts all permit public notices on its website. In addition, the process includes the applicant publishing a notice in a newspaper of local circulation for three consecutive weeks. If objections or protests have been filed by other water right owners, OSE determines whether those were filed timely - within ten days of the last day of publication.

Further, OSE believes the new notification requirements related to publications, applications and protests cannot be met because dates are controlled by the applicant; the bill requires a new form of public notice in addition to the current requirement of publication in a newspaper which could generate confusion and lead to disputes over the deadline for other water right owners to file objections or protests to an application; and, the bill could allow challenges to the adequacy of public notice based on actions or omissions of OSE over which the applicant has no control.

On the other hand, the New Mexico Acequia Association reports SB 12 would improve due process in relation to water right applications. Many rural communities do not have regular access to print newspapers and there is often uncertainty about which newspapers are distributed in rural areas. Rural residents should have a single source of information, such as the OSE website, for all applications rather than having to search multiple newspapers for legal notices.

Further, the New Mexico Acequia Association believes although OSE posts an informal notice about applications on their website, it is not a consistent source of information for purposes of filing timely objections. SB 12 improves access not just to a “courtesy” or “advisory” notice but provides a legal notice with information about filing timely objections along with deadlines.

## TECHNICAL ISSUES

On page 6, lines 14 and 16, OSE notes the term “notice for the filing” is inconsistent with term “notice of the filing” that is used in the existing Section 72-6-6 on page 6, line 9.

## OTHER SUBSTANTIVE ISSUES

Currently, after an application for permit is filed with the State Engineer:

- OSE reviews the application to ensure it is complete;
- OSE drafts a Notice of Publication and directs the applicant to publish it in a newspaper;
- OSE posts the Notice of Publication on its website;
- applicant publishes the Notice of Publication for three consecutive weeks;
- applicant files with OSE the affidavit of publication provided by the newspaper; and
- if objections or protests have been filed by others, whether protests were filed within ten days of the last day of publication based upon the dates certified by the newspaper.

The New Mexico Acequia Association noted that notice of OSE water right applications is a matter of constitutional due process. (*Eldorado v. Cook*, 1991-NMCA-117, 113 N.M. 33 (holding that “[d]ue to the error [in the notice] . . . petitioners failed to receive notice” and this “violated the due process rights” of the potential protestants, and rendered the SEO “without jurisdiction to grant [the application]”). *Id.* at 113 N.M. 36-38.). The New Mexico Supreme

Court, following long-established U.S. Supreme Court decisions, has held that notice by newspaper publication alone is not constitutionally sufficient when the identities and whereabouts of persons whose property is potentially affected are reasonable ascertainable. *Uhden v. N.M. Oil Conservation Comm'n*, 1991-NMSC-089, ¶ 9-13, 112 N.M. 528, 817 P.2d 721, citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306. For these reasons, the nature of the legal notice the OSE is required to give should be expanded, the Association further noted, beyond newspaper publication, in a manner that is more thorough and legally enforceable.

### **ALTERNATIVES**

OSE notes Senate Bill 12 duplicates Senate Bill 86 as introduced in 2017. However, the sponsor worked with OSE on a committee substitute that addressed concerns. The resulting Senate Judiciary Committee substitute for Senate Bill 86 passed both houses. A similar approach could be adopted for Senate Bill 12.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

OSE will continue to post all Notices of Publication on the agency web site and statutorily required public notice will continue through publication in a newspaper of local circulation.

AHO/cw/sb